BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

NORMAN R. GIDEON	)	
Claimant	)	
	)	
VS.	)	
	)	
YOST PROPERTIES	)	
Respondent	)	Docket No. 1,043,042
	)	
AND	)	
	)	
FIRSTCOMP INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the October 6, 2010 preliminary hearing Order[1] entered by Administrative Law Judge Brad E. Avery (ALJ).

ISSUES

The ALJ denied respondent's Motion to Terminate Benefits after concluding 1) respondent had failed to establish the requisite statutory foundation for the admission of certain drug and alcohol test results and 2) respondent had failed to establish that claimant's accident was "contributed to by his alleged drug and or alcohol consumption."[2] Thus, under either scenario, the ALJ concluded that respondent had failed to establish the necessary elements in order to avail itself of the statutory defense afforded by K.S.A. 44-501(d) and as a result, claimant continued to be entitled to the benefits previously ordered.[3]

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[1] These proceedings were initiated as a Motion to Terminate but in reality, respondent is seeking preliminary hearing relief from an earlier order directing it to pay benefits to claimant. Thus, the Board has jurisdiction under K.S.A. 44-534a to hear respondent's appeal.

[2] ALJ Order (Oct. 6, 2010) at 1

[3] ALJ Order (Dec. 7, 2009).

The respondent requests review of this denial alleging "Judge Avery has exceeded his jurisdiction in failing to terminate benefits, despite the evidence showing that the [c]laimant was intoxicated in excess of levels allowed by K.S.A. 44-501(d)(2), and that such intoxication contributed to the accident in question."[4]

Respondent argues that it has proven that the samples that came from claimant, were appropriately tested and that those test results justify a conclusive presumption that claimant was impaired. Moreover, common sense mandates a finding that claimant's presumptive impairment contributed to the accident. Accordingly, respondent maintains that claimant's claim is barred and all benefits must be denied.

Claimant argues that the ALJ should be sustained as respondent failed to meet its burden of proving drug and/or alcohol intoxication pursuant to K.S.A. 44-501(d)(2) and failed to prove that any allegation intoxication contributed to or caused the accident on May 18, 2008.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

This claim was the focus of an earlier preliminary hearing on April 3, 2009 which resulted in an Order that contains a detailed and thorough recitation of the underlying facts. For purposes of brevity, that recitation is hereby adopted as if more fully set forth herein but will be supplemented by a summary of the evidence that has since been developed.[5]

At this juncture, there is no dispute that claimant was in respondent's employ at the time of his injury. And that as he was tearing off a roof, he encountered some ants, stopped to brush away the ants and while doing so the rotting roof gave way and he fell approximately 10 feet to the ground. He was rushed to the hospital where he was subjected to blood and urine tests.

Respondent has repeatedly asserted that these tests show that claimant was impaired by drugs and/or alcohol at the time of his injury. Thus, respondent contends it has no liability in this matter by virtue of K.S.A. 44-501(d).

The Kansas Workers Compensation Act (Act) provides an absolute defense to an employer for an employee's work-related accident when

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[4] Respondent's Amended Notice of Appeal (filed October 21, 2010).

[5] A copy of the ALJ's April 6, 2009 Order is attached hereto and incorporated herein.

> . . . the injury, disability or death was **contributed to** by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances, including but not limited to, any drugs or medications which are available to the public without a prescription from a health care provider, prescription drugs or medications, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens.[6] (emphasis added)

This statute goes on to provide a statutory scheme whereby drug tests can be used as a complete defense to a workers compensation claim. In order to properly enter these test results into evidence and thereby gain the benefits of this defense, certain statutory criteria must be met.[7]

> (A) There was probable cause to believe that the employee used, had possession of, or was impaired by the drug or alcohol while working;
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> (B) the test sample was collected at a time contemporaneous with the events establishing probable cause;
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> (C) the collecting and labeling of the test sample was performed by a licensed health care professional;
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> (D) the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;
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> (E) the test was confirmed by gas chromatography, gas chromatography-mass spectroscopy [GCMS] or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample; and
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> (F) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee.[8]

The failure to establish any one of these criteria renders the test results inadmissible. The probable cause requirement can be satisfied by establishing any one of the following criteria:

> (A) The testing was done as a result of an employer mandated drug testing policy, in place in writing prior to the date of accident, requiring any worker to submit to

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[6] K.S.A. 2007 Supp. 44-501(d)(2).

[7] *Id.*

[8] K.S.A. 2007 Supp. 44-501(d)(2)(A-F).

> testing for drugs or alcohol if they are involved in an accident which requires medical attention;
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> (B) the testing was done in the normal course of medical treatment for reasons related to the health and welfare of the injured worker and was not at the direction of the employer; however, the request for GCMS testing for purposes of confirmation, required by subsection (d)(2)(E) of this section may have been at the employer's request;
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> (C) the worker, prior to the date and time of the accident, gave written consent to the employer that the worker would voluntarily submit to a chemical test for drugs or alcohol following any accident requiring the worker to obtain medical treatment for the injuries suffered. If after suffering an accident requiring medical treatment, the worker refuses to submit to a chemical test for drugs or alcohol, this refusal shall be considered evidence of impairment, however, there must be evidence that the presumed impairment contributed to the accident as required by this section; or
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> (D) the testing was done as a result of federal or state law or a federal or state rule or regulation having the force and effect of law requiring a post accident testing program and such required program was properly implemented at the time of testing.[9]

When this defense was first presented, the ALJ concluded as follows:

> The respondent also presented evidence that the claimant used alcohol, cocaine and marijuana prior to the work event.[10] K.S.A. 44-501 denies workers compensation benefits if the employee's use of alcohol or drugs contributes to the work injury. There was no evidence that the claimant was impaired by alcohol or drugs at the time of the injury, just that they were in his system. Since the injury occurred because of wood crumbling beneath the claimant's feet, it is hard to see how drug or alcohol use would have been a contributing factor, anyway. The respondent failed to prove an intoxication defense.[11]

Since that preliminary hearing Order, claimant's recovery continued but in the fall of 2010 respondent sought to terminate benefits, again based upon the intoxication defense. At this point, respondent offered the testimony of Delores Wishart, a medical technician and the Lab Director for the Mt. Carmel Medical Center for the purpose of laying

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[9] K.S.A. 2007 Supp. 44-501(d)(3)(A-D).

[10] At this preliminary heairng, the ALJ did not address the admissibility of the test results. Given his ultimate conclusion, the admissibility issue was moot.

[11] ALJ Order (April 6, 2009) at 2.

a foundation for the test results.[12] Ms. Wishart oversees the operation of the lab which tested the blood and urine taken from claimant while he was being treated at that facility. However, Ms. Wishart did not test those samples herself. In fact, she was not involved in any way in the retrieval or testing of those samples. She testified that "for the most part" she was familiar with the policies and procedures of her lab[13], although she conceded she "may not be involved in it on a day-to-day basis".[14] Ms. Wishart further testified that the technicians employed by the hospital are not licensed nor are they required to be.

Ms. Wishart retrieved the documents which purport to reference the sampling done on claimant's urine and blood. She testified that claimant's blood sample was drawn at 4:25 p.m. immediately upon his presentation at the emergency room on May 18, 2008. According to the paperwork, this blood sample was drawn by someone Ms. Wishart believes to be a nurse, named "VNorris". The individual did not testify.

Similarly, the paperwork indicates that claimant's urine was collected at 7:36 p.m. that same day but there is a lack of identification as to precisely who collected the urine. The paperwork only referenced an "RN" as being the one who collected the sample.[15]

The samples were subjected to a "stat drug screen" (known as Triage) which is quickly done to determine what chemicals are present in a patient's body.[16] According to Ms. Wishart, for the most part the Triage test is considered reliable.[17] When asked about the chain of custody of each of the samples, Ms. Wishart indicated that there was no chain of custody on these samples other than the normal course of the facility's treatment.[18] She further explained that had these been "legal drug screens"[19] there would have been a chain of custody established and there would have been outside testing. Finally, Mt. Carmel does not perform GCMS testing as they do not have that capacity.[20]

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[12] The test results were marked as exhibits 3 and 4 to her deposition. Claimant registered an evidentiary objection to both of these exhibits.

[13] Wishart Depo. at 4.

[14] *Id.*

[15] *Id.* at 28.

[16] *Id.* at 16.

[17] *Id.* at 16-17.

[18] *Id.* at 21-22.

[19] *Id.* at 22.

[20] *Id.* at 23.

When asked, Ms. Wishart testified that she could not swear that the identity of the person who purportedly collected the sample is the one who logged in the information on the computer log sheet.[21] Nor could she swear the machines that where used to test the samples were running correctly.[22]

Respondent also tendered the reports of Dr. Parmet who opined that "Mr. Gideon was clearly under the influence of alcohol and intoxicated at the time the accident occurred. This level of intoxication impaired his judgment, coordination and balance."

After considering the evidence, the ALJ denied respondent's request to terminate benefits. He offered the following reasoning:

> Motion to terminate workers compensation benefits denied. Objection sustained in Wishart deposition to admission of exhibits 3 and 4. K.S.A. 44-501(d)(2)(F) requires the "Foundation evidence must establish beyond a reasonable doubt, that the results were from the sample taken from the employee." There was no foundation evidence entered to establish the samples involved were taken from the claimant. The personnel who took the samples in question were not deposed.
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> The employer has also failed to establish the claimant's accident was contributed to by his alleged drug and or alcohol consumption. The claimant fell through a weakened portion of the roof after he [was] set upon by ants. Arguendo, Dr. Parmet's [sic] has sufficient qualifications to testify regarding drug and alcohol intoxication, he issued the opinion that claimant fell off the roof because of his deteriorated balance. This version is not consistent with the known facts of the accident.[23]

Respondent appealed this decision alleging that the ALJ "exceeded his jurisdiction in failing to terminate benefits, despite the evidence showing that the [c]laimant was intocated in excess of levels allowed by K.S.A. 44-501(d)(2), and that such intoxication contributed to the accident in question. Furthermore, his failure to terminate such benefits exceeds his jurisdiction."[24]

After considering the record, this Board Member finds the ALJ's Order should be affirmed in its entirety. Like the ALJ, this member finds the foundational evidence in this record to be lacking. As noted by the ALJ, there is a lack of evidence establishing that the blood and urine samples actually came from this claimant. The statute requires "the

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[21] *Id.* at 31-32

[22] *Id.* at 32-33.

[23] ALJ Order (Oct. 6, 2010) at 1-2.

[24] Respondent's Amended Notice of Appeal at 1 (filed Oct. 21, 2010).

foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee."[25] Here, the individuals who actually took the samples did not testify. In fact, in the case of the urine sample it is entirely unclear precisely *who* collected that sample or for that matter, if they were even licensed health care professions, as required by K.S.A. 44-501(d)(2)(C). Without hearing from those individual(s) it is difficult to place any confidence in the test results much less make a finding that, *beyond a reasonable doubt,* the results are from claimant's own blood and/or urine sample.

Our Courts have concluded that "[e]stablishing the chain of custody is part of the foundation for the admission of physical evidence."[26] Thus, while the statute does not expressly use the term "chain of custody" it nonetheless requires evidence which establishes beyond a reasonable doubt that the results are from tests performed on claimant's urine. Absent a demonstrable and reliable chain of custody, it would be impossible to conclude, beyond a reasonable doubt, that a given sample was from the claimant and that the same sample that was used for the drug test.

This Board Member is not persuaded that an appropriate and sufficient foundation has been laid for the admission of the drug or the alcohol test results. This record merely contains the testimony of a woman who oversees the testing done by others and she has only testified as to what information was inputted into the lab's computer. This evidence does little to satisfy the foundational requirements set forth in subparagraph (F) of the statute. Accordingly, that portion of the ALJ's Order that denies respondent's request to terminate benefits based upon respondent's failure to establish a sufficient foundational basis for the admission of the drug and alcohol test results is affirmed.

The ALJ also found that respondent failed to establish that claimant's accident was contributed to by his alleged drug and or alcohol consumption. This Board Member finds this conclusion should also be affirmed.

Dr. Parmet's testimony, offered through his written reports, indicates that he believes claimant fell off the roof because of his deteriorated balance which was due to alcohol and drugs found in his body, as evidenced by the test results. Like the ALJ, this Board Member finds his conclusions wholly inconsistent with the known *and uncontroverted* facts of the accident. Claimant did not fall **off** the roof, he fell **through** the roof in an area that had rotted away. The ALJ's finding is affirmed.

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[25] K.S.A. 44-510(d)(2)(F).

[26] *State v. Taylor*, 231 Kan. 171, 642 P.2d 989 (1982).

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[27] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Brad E. Avery dated October 6, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December 2010.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: Angela D. Trimble, Attorney for Claimant
Joseph R. Ebbert, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

[27] K.S.A. 44-534a.